No. 22342

In the

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,
Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Petition for Rehearing

FENNEMORE, CRAIG, VON AMMON,
McCLENNEN & UDALL
JOHN J. O'CONNOR III
900 First National Bank Building
Phoenix, Arizona 85004
Attorneys for the Petitioner

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

No. 22342

In the

United States Court of Appeals

For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,
Appellant,

vs.

JOE ROSE, JR. and VERONICA ROSE, his wife,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Petition for Rehearing

Appellant, Farmers Insurance Exchange, petitions the court for a rehearing in the above entitled matter on the ground and for reason hereinafter set forth.

The petitioner's ground for rehearing is that the court in its opinion has failed to discuss in any way or to resolve the ultimate key issue in this appeal, which was the primary issue discussed at the oral argument, namely, the effect of the following language in the petitioner's policy:

> "When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle responsibility law, such insurance as is afforded by this policy for bodily injury liability or property damage liability shall

> comply with the provisions of such law *to the extent of* the coverage and *limits of liability* (Note: $10,000/$20,000. A.R.S. § 28-1170 B 2 (a) (b)) *required by such law,* but in no event in excess of the limits of liability stated in this policy." (Emphasis supplied)

Stated simply, the language just quoted unequivocally provides that if there is coverage (as here) solely by virtue of a provision of the Arizona Financial Responsibility Act such as A.R.S. § 28-1170 F 1, such coverage extends only to the "limits of liability required" by the Financial Responsibility Act which is $10,000/$20,000.

In addition to being the prime issue presented and discussed at the oral argument, this issue was discussed in Appellant's opening brief at page 13 and referred to in Appellant's reply brief at page 3.

The issue identified above is and always has been a key issue in this lawsuit. If resolved favorably to this petitioner, this court's decision would necessarily result in a reversal rather than an affirmance of the District Court's judgment.

The only specific portion of this court's opinion which your petitioner questions by this petition is the last four paragraphs of the opinion. The court holds in these paragraphs that petitioner's liability is not limited to the $10,000/$20,000 amounts specified in A.R.S. § 28-1170 B (2) (a) and (b), but extends to the full limits of $50,000/$100,000.

The court bases this holding solely and expressly on *Sandoval v. Chenoweth,* 102 Ariz. 241, 428 P.2d 98. In *Sandoval* the policy in question did not contain a clause such as was contained in the policy in this case, which clause is quoted above.

As was pointed out at the oral argument, in *Sandoval* there are three separate places in the court's opinion where the Arizona Supreme Court states or implies that if the policy does (as *is* the case here and *was not* the case in *Sandoval*) contain a limitation of the amount of insurance available when there is liability under the policy because of the Arizona Financial Responsibility Act, liability under the policy will be limited to $10,000/$20,000.

"[S]ince the policy itself contains no differentiation as to . . . the amounts of the protection, we find no basis for curtailment of . . . coverage." 428 P.2d 103

Comment: The necessary corollary, of course, is that there would be a curtailment of coverage if, as here, the policy does provide for different amounts of protection.

"[S]ince the . . . policy did not set up different provisions for (different types of insureds, they will be treated the same.)" 428 P.2d 104.

Comment: Again, the clear and necessary inference is that the policy can provide for different limits of liability when liability results by virtue of coverage imposed by fiat of law as distinguished from liability resulting from a risk expressly covered under the terms of the policy.

"[T]he second sentence of (A.R.S. § 28-1170 G) is ineffectual to limit coverage to the minimum amount required." 428 P.2d 104

Comment: Granted, but this doesn't mean that an express policy provision is ineffectual to limit liability. To the contrary the statute (A.R.S. § 28-1170 G) and the court in *Sandoval,* in the remarks quoted above, indicates that such a provision is effective to limit liability.

The consideration of the policy provision not discussed by the court in its opinion would allow the court to sustain its essential holding in *Weeks v. Atlantic National Insurance Company,* 9 Cir., 370 Fed. 2d 264, provided that there is a policy provision such as there, in fact, is in this case.

Parenthetically, it should be noted that the fact that the policy in this case is not certified does not effect the results suggested above by your petitioner. As the opinion of this court indicates, the Arizona Supreme Court has abolished any distinction between certified and noncertified policies in determining whether there is responsibility under the Arizona Financial Responsibility Act. Had this distinction not been abolished petitioner would not have been charged with responsibility in this action in the first place. This is evident because the court held as it did in its opinion because of A.R.S. § 28-1170 F 1 which by its terms applies only to certified policies, which this policy was not, as is indicated in footnote 1 to the opinion.

It is obvious from the last four paragraphs of the court's opinion, from footnote 6 to its opinion and from the *Weeks* case this court feels that, as an original proposition, liability should not be imposed for an amount in excess of $10,000/$20,000 under the applicable Arizona statutes. The court holds, as it does in its opinion in this case, solely because of its belief as to what the Arizona Supreme Court would do. However, this court has failed to consider the fact that in this case there is an express policy provision which the Arizona Supreme Court has indicated would bring about a different result from the decision of the Arizona Supreme Court in *Sandoval,* a result this court has indicated it thinks is appropriate and correct.

Accordingly, this petition for rehearing should be granted so that the court can consider the key issue not previously considered or resolved and alter its opinion to provide that in view of the language of the policy before the court in this case the decision of the District Court should be reversed.

FENNEMORE, CRAIG, VON AMMON,
McCLENNEN & UDALL
By JOHN J. O'CONNOR III
900 First National Bank Building
Phoenix, Arizona 85004
Attorneys for the Petitioner

I certify that in my judgment the above Petition for Rehearing is well founded and that it is not interposed for delay.

JOHN J. O'CONNOR III